IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of	)	No. 62091-6-I
	)	
KATHRYN PHILLIPS,	)	DIVISION ONE
	)	
Respondent,	)	
	)	
and	)	UNPUBLISHED
	)	
GREGORY SCOT PHILLIPS,	)	FILED: July 20, 2009
	)	
Appellant.	)	
	)	
	)	

Cox, J. – Gregory Scot Phillips raises several issues in his appeal of the trial court's order distributing property following his divorce from to Kathryn Phillips.[1] We hold that the trial court did not abuse its discretion in assigning different valuation dates to different assets in making a fair and equitable distribution. Greg did not present sufficient evidence that certain debts were incurred during the marriage to invoke the presumption that the debts were community in nature. As a result, the trial court did not abuse its discretion in its valuation of Greg's separate inheritance property. Nor did the trial court improperly dispose of assets no longer in existence. Finally, the trial court did not abuse its discretion in concluding that Kathryn's severance pay was her separate property. We affirm.

[1] For the sake of clarity, we refer to the parties by their first names.

Greg and Kathryn Phillips were married in Washington on July 27, 1991. They separated on September 11, 2002, and divorced on October 1, 2004, in British Columbia, Canada. The Canadian divorce made no provisions for distributing the property or debt of the parties. Following the divorce, Kathryn filed an action in Whatcom County seeking distribution of the parties' assets and liabilities, including two parcels of real property in Everson, Washington.

The trial court heard testimony from Greg and Kathryn and received extensive briefing before reaching a decision about the distribution of the assets. The trial court awarded all separate property and debts to their respective owners. The court primarily focused its distribution analysis on division of the parties' community property. In a letter explaining its decision, the trial court stated:

> In the final tally, my calculations indicate that the total of each party's share of the community assets, after making assignment of the debts thereupon, is surprisingly close. . . . [T]he Court's obligation is to reach an equitable division of assets, not an equal division. It is my belief that the division I have set forth [is] clearly the former and quite nearly the latter.[2]

The largest portion of the community property distribution was the award of one parcel of real property to Kathryn (Lot A) and one to Greg (Lot B). The court gave Kathryn a $50,000 lien on Lot B, in recognition of the fact that she had made a down payment on Lot B in that amount with her separate property.

[2] Clerk's Papers at 18.

Both parties had pension and retirement accounts that were partially separate and partially community property, which the trial court awarded in full to their respective holders. The court also awarded to Greg a community car.

Greg appeals.

VALUATION DATES

Greg argues that the trial court's decision to use different valuation dates for different assets was an abuse of discretion. We disagree.

A trial court has broad discretion when distributing property in a marital dissolution.[3] The property division need not be equal.[4] The court must only "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors."[5] The trial court has broad discretion in setting a date on which to value property.[6]

Greg misconstrues the holdings in Lucker v. Lucker[7] and Koher v.

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[3] In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (citing RCW 26.09.080).

[4] RCW 26.09.080.

[5] RCW 26.09.080.

[6] Lucker v. Lucker, 71 Wn.2d 165, 166-68, 426 P.2d 981 (1967); Koher v. Morgan, 93 Wn. App. 398, 404, 968 P.2d 920 (1998), review denied, 137 Wn.2d 1035 (1999); see also 20 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 32.7, at 167 (1997 & Supp. 2008) ("The court may not only may select a valuation date that is fair to both parties, but the court is free to select a different valuation date for different assets if to do so would bring about a fair distribution of the assets.").

Morgan[8] as requiring the trial court to affix the value of all property at the same point in time. But this was not the issue in either case. Rather, the issue in Lucker was whether the trial court was required to consider appreciation and depreciation of property.[9] There, the trial court considered only the value of property at the time of trial and did not account for depreciation or the husband's use of the property during the parties' five-year separation. The court held, "[i]f the property is to be valued as of the date of trial, rather than the date of separation, appreciation as well as depreciation in value should be considered in making an equitable division."[1]

In Koher, a meretricious relationship case, the issue was whether the court had to use the date of separation rather than the date of trial for valuing the couple's assets.[11] Because the court had already determined that the disputed assets belonged to the relationship, and were not the appellant's separate property, it held that the trial court did not abuse its discretion in distributing the assets' value at the time of trial rather than at the time of

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[7] 71 Wn.2d 165, 426 P.2d 981 (1967).

[8] 93 Wn. App. 398, 968 P.2d 920 (1998), review denied, 137 Wn.2d 1035 (1999).

[9] Lucker, 71 Wn.2d at 168.

[1] Id.

[11] Koher, 93 Wn. App. at 404-05.

separation.[12] "The increase in the value of the assets after separation was not Koher's separate property."[13]

Here, the property distributed by the trial court was a mix of real property and financial accounts. The trial court appears to have used the value of Kathryn's severance package, employee share funds, and pension, and Greg's retirement and pension accounts, at the time of separation. The trial court accepted a value of the real property estimated near the time of trial. As to the valuation date of the real property, the court explained, "[t]hat date is fair to both parties and gives them both the appropriate appreciated value for their investment."[14]

Neither Lucker nor Koher requires the trial court to apply the same valuation date for all property it distributes. Nor did the trial court abuse its discretion in assigning different valuation dates to the different assets at issue here. Because all earnings and debts accrued after separation were each party's separate property,[15] it was reasonable for the trial court to consider the value of various financial accounts at the time the parties separated. The court's decision to use the date of trial as the valuation date for the real property was also reasonable in light of the principle stated in Koher where property is shown

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[12] Id. at 405.

[13] Id.

[14] Clerk's Papers at 18.

[15] See Clerk's Papers at 15; RCW 26.16.140.

to be community property, the increase in its value after separation is not separate property.[16]

We also reject Greg's argument that the varying exchange rate between Canadian and American dollars somehow makes the trial court's ruling unfair. There simply is no persuasive proof in this record to support that argument.

CREDIT CARD DEBT

Greg argues that the trial court abused its discretion in denying his request for an equitable offset for payments he made to community credit card debt. We disagree.

A debt incurred by either spouse during marriage is presumed to be a community debt.[17]

The evidence presented by Greg that was admitted at trial showed payments he made on credit cards. The bulk of these payments were made after the parties separated. Greg testified that he paid a total of $77,794.33 on credit card debts. He testified that the payments were made on community debts and that he did not use any of the credit cards after separation. But Greg also testified, on cross-examination, that he could not provide any proof of what the credit card balances were in September 2002, when the parties separated. He also stated that he could not prove that any of the credit cards were used for community benefit.

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[16] See Koher at 93 Wn. App. at 405.

[17] Oil Heat Co. v. Sweeney, 26 Wn. App. 351, 353, 613 P.2d 169 (1980).

The trial court, in its findings of fact, determined that Greg had incurred debts on various credit cards as a separate liability. In its Decree Dividing Property and Liabilities, the trial court ordered Greg to pay all debt from credit cards in his possession. In a letter explaining its ruling, the trial court stated:

> I find that [Greg] has failed to establish that the credit card debts were community in nature, and I find it more likely than not that the majority of these debts were his separate responsibility. He had full access to all documents, receipts, and everything else necessary to establish the nature of these debts, but he presented virtually nothing in the way of evidence.[18]

This factual determination by the trial court is substantiated by the record, which shows that Greg failed to demonstrate that the credit card debts upon which he made payments after separation were incurred before separation and were therefore community in nature. The presumption of the community nature of the debts does not arise until the evidence establishes that the debt was incurred ***during marriage***, before the parties were separated.[19] The trial court implicitly found that Greg's testimony about the nature of the debts was not credible. We do not review credibility determinations on appeal.[2] The trial court

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[18] Clerk's Papers at 18-19.

[19] See Sweeney, 26 Wn. App. at 353 (Debt incurred by either spouse during marriage is presumed to be a community debt, but "[w]hen no community exists to incur liability because the parties are living separate and apart, the presumption may be overcome as community liability ordinarily will not attach to a marriage that is clearly defunct."); In re Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002) (earnings and accumulations during a permanent separation are considered separate property (citing RCW 26.16.140)).

[2] See In re Marriage of Rideout, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).

did not abuse its discretion in determining that the credit card debts were separate debts and therefore refusing to give Greg any equitable offset for payments toward them.

Greg argues that the trial court placed an improper burden of proof upon him to prove that the debts were community in nature. But, as stated in Greg's own briefing to this court, debts are presumed to be community in nature ***once they are established to have been incurred during the marriage***.[21] As discussed above, Greg has not established this essential fact.

Greg also challenges the trial court's decision to not admit a copy of his credit report into evidence. The trial court rejected the evidence because it was not relevant. This was not an abuse of discretion.

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.[22] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[23] Evidence which is not relevant is not admissible.[24]

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[21] Brief of Appellant at 16 (emphasis added).

[22] Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

[23] ER 401.

[24] ER 402.

Here, Greg offered evidence of his credit report, generated in 2007. The report shows that certain credit cards existed in Greg's name during the parties' marriage and after their separation. The report shows the dates on which accounts were opened and closed. Most of the accounts were opened while the parties were married and either remained open at the time of the report or were closed after the parties separated. The report also shows the accounts' balances on the date the report was generated. The report does not show the accounts' balances on any other listed date. Nor does it show when any accounts were paid off.

The trial court rejected the report because it was not relevant. The court explained that all the report "could establish is that . . . the accounts for the credit cards issued were existing accounts at the time of the marriage. It doesn't show anything about what was purchased."[25] The court expressed concern that the report would look the same even if "a week after separation [Greg] wracked up 45 or $50,000 in credit card debts."[26]

The trial court did not abuse its discretion in rejecting this evidence. After reviewing the report, we agree that it does not indicate whether any of the credit card debts at issue were incurred before the parties separated. Though Greg sought to prove that he had paid off community debts, the evidence offered did not make it any more probable or less probable that the debts were in fact

[25] Report of Proceedings (March 5, 2008) at 80

[26] Id.

community in nature.

PROFITS FROM INHERITED PROPERTY

Greg argues that the trial court erred when it found that he had profits from inherited real property in the amount of $238,000 and then awarded the disposed property to him in the decree. We disagree.

The trial court found that Greg had, as separate property, profits from inherited real property in the amount of approximately $238,000. In its decree, the trial court awarded Greg "100% profits from inherited real property."

Greg's primary contention appears to be that the amount of profits from his inherited property – $238,000 – is incorrect in light of the $77,794.33 in credit card debt he paid with those profits. But, as discussed above, Greg did not present sufficient evidence to prove that the credit card debt falls within the presumption of community debt. The trial court therefore properly characterized it as Greg's separate debt. Given that the trial court also found Greg's profits from the property he inherited to be separate in nature, we see no error. This appears to be nothing more than an alternative argument that the trial court should have given Greg an equitable offset for his payment of the credit card debt. We have already addressed that issue.

To the extent Greg argues that the trial court improperly distributed an asset no longer in existence,[27] he is mistaken. The decree awards to Greg the ***profits*** from his inherited real property, not the real property itself.[28] Though

[27] Brief of Appellant at 18; see also In re Marriage of White, 105 Wn. App.

Greg now contends that some portion of the profits were no longer in existence at the time of trial, the trial court is not required to affix the valuation of an asset at the time of trial. Instead, as we have already discussed, the trial court has broad discretion in setting a date on which to value property.[29]

SEVERANCE PAY

Greg argues that the trial court improperly characterized profit sharing funds and the severance package from Kathryn's employer as Kathryn's separate property. We disagree.

In considering the factors set forth in RCW 26.09.080, the trial court has a duty to characterize the property as either community or separate, as of the date of its acquisition.[3] Although failure to properly characterize property may be reversible error, mischaracterization of property is not grounds for setting aside a trial court's property distribution if it is fair and equitable.[31] Remand is necessary only when the characterization of the property is crucial to the distribution.[32]

545, 549, 20 P.3d 481 (2001) ("If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial.").

[28] Clerk's Papers at 14 (emphasis added).

[29] Lucker, 71 Wn.2d at 166-68.

[3] In re Marriage of Gillespie, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997).

[31] Id. (citing In re Marriage of Shannon, 55 Wn. App. 137, 140, 777 P.2d 8 (1989)).

[32] In re Marriage of Langham and Kolde, 153 Wn.2d 553, 563 n.7, 106

Division Two of this court has ruled that severance pay, even where correlated to years of past employment, does not serve as additional compensation for those past services.[33] The court, in In re Marriage of Bishop,[34] ruled that if a spouse's dismissal from employment occurs during the marriage, and the former mere expectancy or contingency of severance pay "has ripened into a right to payment or payment is received, it has become property and must be characterized and considered by the court in making a fair and equitable division of all property, both community or separate."[35]

The court expressly noted that separation may affect the character of severance pay:

> Because, as we have shown, severance pay is intended primarily to alleviate financial loss, and that loss ordinarily will fall upon the marital community until it is dissolved, to that extent the payment should be considered community property. To the extent the payment will soften the blow upon the spouse enduring dismissal after dissolution, *i.e.*, upon his or her future economic circumstances, including loss of wages, it should be considered separate property. The severance pay to that extent simply substitutes for a loss of wages which would be the separate or personal property of the dismissed person and to which his former spouse has no claim.[36]

The court then cited RCW 26.16.140, which provides that the earnings and

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P.3d 212 (2005) (citing Shannon, 55 Wn. App. at 142).

[33] In re Marriage of Bishop, 46 Wn. App. 198, 203, 729 P.2d 647 (1986).

[34] 46 Wn. App. 198, 729 P.2d 647 (1986).

[35] Id. at 204.

[36] Bishop, 46 Wn. App. at 204 (citing RCW 26.16.140).

accumulations of separated spouses are the separate property of each spouse.

Kathryn worked at the Canadian Imperial Bank of Commerce (CIBC) from 1972 until August 31, 2002. The parties were married on July 27, 1991, and separated on September 11, 2002. Kathryn received a severance package from CIBC around September 8, 2002, for approximately $54,629.31. She later received pension and employee share funds from CIBC.

Here, the trial found that Kathryn's severance package was her separate property and awarded it entirely to her. Had the parties already been separated at the time of Kathryn's dismissal from CIBC, the severance payment would have clearly been her separate property under Bishop. The trial court did not abuse its discretion in reaching the same conclusion where the parties separated within days of the severance payment. This conclusion is also consistent with the recognized purpose of severance pay, which is to alleviate the financial loss of the person enduring the loss—here, predominantly Kathryn.

Greg construes the holding in Bishop to mean that severance pay to a spouse should be characterized as community property any time that it is paid prior to dissolution, even if, as in this case, the parties had been separated for more than two years before the dissolution was finalized. But, as discussed above, this oversimplifies Bishop.

Greg next argues that the trial court erred in characterizing Kathryn's profit-sharing funds as her separate property. The record does not support this assertion. The trial court's written ruling explains that the court first characterized the approximately

$21,350 in the account. The trial court found that approximately $18,000 of Kathryn's employee share funds was community property and approximately $3,350 was her separate property. The court also noted that it took into account "that approximately $55,000 of [Kathryn's] profit sharing funds were expended for the community."[37] Despite Greg's arguments otherwise, it is not clear that the court considered the $55,000 in expenditures to be from Kathryn's ***separate property*** rather than merely from an account held in her name. The significance of the $55,000 is also not clear on this record. Greg has not shown that, even if the trial court mischaracterized the $55,000 as separate property, the mischaracterization led to a distribution that was not fair and equitable.[38]

ATTORNEY FEES

Kathryn has requested an award of reasonable attorney fees and costs on appeal under RCW 26.09.140 and RAP 18.1. Absent an affidavit of financial need, no fees are awardable.

We affirm the Findings of Fact and Conclusions of Law and the Decree Dividing Property and Liabilities.

Cox, J.

[37] Clerk's Papers at 18; accord Clerk's Papers at 11.

[38] See Gillespie, 89 Wn. App. at 399 (citing Shannon, 55 Wn. App. at 140).

WE CONCUR: